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International Convention for the Protection of All Persons from Enforced Disappearance

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Consideration of reports of States parties to the Convention

List of issues in relation to the report submitted by the Netherlands under article 29, paragraph 1, of the Convention

Addendum

Replies of the Netherlands to the list of issues*

[21 February 2014]

Introduction

1. The report of the Netherlands on the measures taken to give effect to the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance (hereafter "the Convention") was submitted on 11 June 2013 (CED/C/NLD/1). In November 2013, the Netherlands received the list of issues in relation to its report (CED/C/NLD/Q/1) from the Committee on Enforced Disappearances. The Netherlands hereby submits its written response to the list of issues. It is arranged in the same order as the list of issues and repeats each of the Committee's questions before proceeding to give its answer.

I. General Information

Paragraph 1 of the list of issues (CED/C/NLD/Q/1)

Please provide information about the process of preparation of the report, including consultations with different organs of the State party, civil society actors and other relevant stakeholders which might have taken place.

* The present document is being issued without formal editing.

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2. The Ministry of Foreign Affairs is responsible for the coordination of all reports submitted under United Nations human rights treaties. Given that the Convention largely relates to matters that are the responsibility of the Ministry of Security and Justice, the latter Ministry supplied the initial draft. Several directorates, departments and services within the Ministry of Security and Justice were consulted. These included the Directorate for Legislation and Legal Affairs, the Directorate for Legal and Operational Affairs, the Directorate for Sanctions and Prevention Policy, the Policing and Police Policy Department, the Directorate for the Legal System, the Migration Policy Department, the Directorate for European and International Affairs, the Public Prosecution Service, the Council for the Judiciary and the Custodial Institutions Agency. Other ministries were also involved and contributed to the report, such as the Ministry of Defence, the Ministry of the Interior and Kingdom Relations and the Ministry of Social Affairs and Employment.

Paragraph 2

As the ratification of the Convention and the acceptance of the competence of the Committee under articles 31 and 32 by the Kingdom of the Netherlands have been made with regard to the European part of the Netherlands and the Caribbean part of the Netherlands (the islands of Bonaire, St Eustatius and Saba), please indicate whether it is envisaged to extend the ratification and the acceptance of the competence of the Committee under articles 31 and 32 to Aruba, Curaçao and St Maarten.

3. It is envisaged that the ratification of the Convention and the acceptance of the Committee's competence under articles 31 and 32 will be extended to Aruba, Curaçao and St Maarten. These three parts of the Kingdom are currently taking stock of the amendments that will need to be made to their legislation.

In addition, please indicate whether any of the legal or other provisions referred to in the report are not applicable to the Caribbean part of the Netherlands and, if that is the case, please detail the relevant provisions which apply.

4. A separate Criminal Code (Criminal Code BES) applies on the islands of Bonaire, St Eustatius and Saba. However, it is very similar to the Criminal Code in force in the European part of the Netherlands. The International Crimes Act also applies on the three islands.

Paragraph 3

Taking into consideration that the core document was submitted by the Kingdom of the Netherlands for the European part of the Kingdom in 1995, please provide updated information about the status of the Convention vis-à-vis national law and indicate whether the provisions of the Convention can be directly invoked before and applied by courts or other relevant authorities.

5. International obligations take effect in the national legal order on the basis of articles 93 and 94 of the Constitution. Article 93 provides as follows: "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published". Article 94 of the Constitution provides as follows: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons".

6. Provisions of treaties that have "direct effect" under article 93 can be invoked by an individual and their application can be legally enforced if needs be. The answer to the question of whether a treaty provision has direct effect is ultimately determined by the courts on the basis of the formulation of the provision. Treaty provisions that do not have direct effect are required, where necessary, to be implemented in national legislation.

Please also provide additional updated information about the two complaints referred to in paragraph 23 of the report, with an indication of whether any of the provisions of the Convention was invoked by the complainants and/or applied by the relevant authorities.

7. As noted in the report, the Public Prosecution Service decided that the first of the two criminal complaints did not yield realistic grounds for a successful prosecution. This decision was then followed by the second criminal complaint noted in the report, which was lodged by the same party and related to the same set of facts and the same person as the first one. There was nothing in this second criminal complaint to prompt a different assessment. In both cases the complainant invoked the Convention and in both cases the Public Prosecution Service took the provisions of the Convention into account as part of its assessment.

8. Besides the information concerning these two criminal complaints, the following information about the efforts of the Dutch authorities in the area of enforced disappearances is hereby submitted. In September 2013, the National Public Prosecutors' Office published the results of an investigation into war crimes and enforced disappearances in Afghanistan in 1978–1979. The investigation in this matter had been initiated ex officio and was subsequently terminated because of the death of the suspect, who had been living in the Netherlands. The investigation had revealed information about the fate of thousands of people who had been arrested and subsequently disappeared in Afghanistan in 1978–1979. Almost 5,000 names are mentioned in lists in which the authorities kept meticulous records of people murdered by the regime. Many surviving relatives had lived in uncertainty about the fate of their loved ones for over thirty years. However, the Public Prosecution Service was unable to trace all these surviving relatives and inform them of what had happened, and the International Committee of the Red Cross also stated that it could not help in this matter. The Public Prosecution Service therefore decided to place the information on its website and to inform the media that it was doing so.[1] This led to reports in the national and international media and to the proclamation of two days' national mourning in Afghanistan. As a result, many of the bereaved finally learned of the fate suffered by their relatives and friends.

Paragraph 4

In relation to paragraph 24 of the report, please provide concrete examples of measures taken by the State party to combat the crime of enforced disappearance. Please also provide information about the activities carried out by the International Crimes Task Force with regard to enforced disappearances (para. 25 of the report). Please also provide information relevant to enforced disappearances with regard to the annual international crimes reporting letter to the House of Representatives mentioned in paragraphs 28–30 of the report.

9. Enforced disappearances are combated as part of the wider spectrum of efforts in the Netherlands to combat international crimes. Besides investigation and prosecution, these efforts include combating impunity through international cooperation and preventing persons suspected of international crimes from entering the Netherlands. The International Crimes Task Force determines the form to be taken by this programmatic approach. The Task Force is advised by an Operational Consultative Committee, in which matters are discussed and decisions harmonised. These consultations take place on an ad hoc as well as a structural basis.

[1] See www.om.nl/onderwerpen/internationale/morotai-(english)/ for the publication of these names and the background information.

10. As recorded in the report and in the answers given above, there have been no prosecutions in the Netherlands for the crime of enforced disappearance. However, individuals have been prosecuted for other international crimes under the International Crimes Act and extraditions have also taken place. Information regarding prosecutions of this kind is published in the international crimes reporting letter to parliament, which also contains statistics on all national prosecutions for international crimes. These statistics are not broken down according to the specific type of offence.

II. Definition and criminalization of enforced disappearance (arts. 1-7)

Paragraph 5

Please indicate whether legal and/or administrative measures exist to guarantee that no derogation to the right not to be subjected to enforced disappearance is made under exceptional circumstances, whether a state of war or a threat of war, internal political instability or any other public emergency. Please also indicate whether any legislation and/or practices concerning terrorism, emergency situations, national security or other grounds that the State party may have adopted have had any impact on the effective implementation of the Convention, in particular the prohibitions stemming from articles 1 and 16 (arts. 1 and 16).

11. Under article 103 of the Constitution, the cases in which a state of emergency may be declared are defined by act of parliament. To implement this provision, the following acts of parliament, among others, have been enacted: the Exceptional Emergencies (Coordination) Act, the Civil Authority Special Powers Act and the War Act. If an exceptional emergency (that is, state of emergency) is declared, the appropriate emergency legislation may come into force.

12. Under article 103, paragraph 2, of the Constitution, there may, in an exceptional situation, be a departure from certain fundamental rights, such as the right to freedom of expression, the right of association, and the right of assembly and demonstration. In addition, the Administration of Justice (Emergencies) Act provides for the possibility, in case of emergency, of entrusting criminal trials and the imposition of custodial sentences to mobile courts established under the Military Criminal Justice Act (which has never happened so far, see also para. 12 below). It is not permissible, in any emergency, to depart from article 15 of the Constitution, which protects citizens from the arbitrary deprivation of liberty and in which the principle of habeas corpus is enshrined.

Paragraph 6

Please provide information about applicable law with regard to the conducts described in article 6, paragraph 1 (a), of the Convention, including ordering, soliciting, inducing, attempting to commit, being accomplice or participating in an enforced disappearance or other conducts which by virtue of their nature are similar to those mentioned (art. 6).

13. In addition to specific provisions in the International Crimes Act as described in paragraphs 41 to 44 of the Netherlands' report, attempting or preparing to commit a crime and the various forms of participation are regulated in article 45 *et seq.* of the Criminal Code. These are general provisions that apply to all criminal offences, that is, including the crime of enforced disappearance. Attempting to commit a crime is regulated in article 45 of the Criminal Code, while preparing to commit a crime is regulated in article 46. Article 47 describes the different forms of participation in a criminal offence: committing an offence, procuring the commission of an offence, joint perpetration and instigation. Article 48 deals with complicity in criminal offences: intentionally assisting in the commission of a criminal offence, and intentionally providing an opportunity, means or information for the commission of a criminal offence. Article 131 deals with incitement.

Paragraph 7

Please indicate whether domestic law provides for disciplinary sanctions, including disqualification, for those persons convicted of enforced disappearance. Please also provide information about the different categories of fines that could be imposed to persons convicted of enforced disappearance under section 8a of the International Crimes Act (art. 7).

14. Section 8a, subsection 1, of the International Crimes Act provides for the punishment of the crime of enforced disappearance by a prison sentence not exceeding 15 years and/or a fifth-category fine. In the event of aggravating circumstances as described in section 8a, subsection 2, life imprisonment or a prison sentence not exceeding 30 years and/or a sixth-category fine can be imposed. A fifth-category fine equals (as of 1 January 2014) a fine not exceeding 81,000 euros. A sixth-category fine equals (as of 1 January 2014) a fine not exceeding 810,000 euros (art. 23 of the Criminal Code).

III. Judicial procedure and cooperation in criminal matters (arts. 8-15)

Paragraph 8

In relation to article 10, paragraph 2, of the Convention, please provide information about the existing legal or other measures to: (a) carry out a preliminary inquiry or investigation to establish the facts should the State party have taken the measures referred to in article 10, paragraph 1, of the Convention; and (b) notify the States referred to in article 9, paragraph 1, of the Convention of the measures taken in pursuance of article 10, paragraph 1, of the Convention, including detention and the circumstances warranting detention, and on the findings of its preliminary inquiry or investigation, indicating whether it intends to exercise jurisdiction (art. 10).

15. The Netherlands has jurisdiction, and criminal proceedings may be instituted, if the person concerned is in the Netherlands, the offences were committed against a Dutch national, the offender has Dutch nationality or the offences were committed in the Netherlands. The conditions to be met are described in the Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions. Further information about these instructions is given in section 13 below. If an investigation is launched into persons suspected of committing the offence of enforced disappearance, all the investigative activities in the Code of Criminal Procedure can be deployed.

16. If another State, which is party to the Convention, has requested the extradition of a person suspected of committing an enforced disappearance, Dutch legislation provides for the possibility of extraditing the person to the requesting State. In addition, the Netherlands itself has jurisdiction on the basis of section 2, subsection 1 (a), of the International Crimes Act. In a case of overlapping jurisdiction of this kind, consultations must be held with the country concerned to decide which country will prosecute the person.

Paragraph 9

Please indicate whether military authorities are competent under domestic law to investigate and/or try alleged cases of enforced disappearance. If so, please provide information about applicable legislation (art. 11).

17. The powers of the Royal Netherlands Marechaussee to carry out law enforcement tasks and criminal investigations are laid down in the Police Act 2012 and the Aliens Act 2000. The Royal Netherlands Marechaussee is competent to investigate any case of enforced disappearance that it may encounter in the course of its duties. It should be emphasised that criminal investigations and acts of law enforcement undertaken by the Royal Netherlands Marechaussee take place at all times under the exclusive supervision,

direction and authority of the Public Prosecution Service (section 14, subsection 2, of the Police Act 2012).

18. The law provides for the option of establishing mobile courts in case of emergency (section 10 *et seq.*, Military Criminal Justice Act). Although such courts in principle consist of one military and two civilian judges, in exceptional cases (in the absence of any civilian judges to sit on the bench) they may consist of military judges only. However, these courts do not operate under the authority of the military, but under that of the national civilian justice system. It is theoretically possible that such a court might try a case of enforced disappearance. It should be noted that, to date, no mobile court has ever been established.

Paragraph 10

In relation to paragraph 38 of the report, please provide information about the specific rules for the investigation of cases of enforced disappearance laid down by the Disposal of Criminal Complaints Instructions. In addition, please indicate whether there are any departments or officials within the police forces, the Public Prosecution services or other relevant agencies specifically trained to start investigations of cases of alleged enforced disappearance. In this respect, please also indicate whether the said or any other authorities responsible for investigating cases of alleged enforced disappearances may: (a) start investigations ex officio; and (b) be subject to any limitations which may restrict their access to places of detention where there are grounds to believe that a disappeared person may be present. Furthermore, and in relation to paragraphs 21, 22, 57 and 58 of the report, please provide more information about the relevant legal provisions and/or principles that guide prosecutors when deciding whether or not cases should be investigated and/or prosecuted (arts. 11 and 12).

19. Criminal investigations of enforced disappearance are conducted by the International Crimes Team (TIM) of the National Police Services Unit (ELPD) and the International Crimes Unit of the National Public Prosecutors' Office (LP-IM). The TIM and the LP-IM have the task of investigating the crimes listed in the International Crimes Act and prosecuting those concerned. These crimes are genocide, crimes against humanity, war crimes, torture, and enforced disappearances. The training of the officers attached to the TIM and LP-IM is geared towards investigations and prosecutions related to all crimes listed in the International Crimes Act, including enforced disappearance.

20. The Disposal of Criminal Complaints (Offences under the International Crimes Act) Instructions are available in full for public inspection.[2] They contain further information on the specific rules for the investigation of cases of enforced disappearance and about the relevant legal provisions and/or principles that guide prosecutors when deciding whether or not cases should be investigated and/or prosecuted. These Instructions prescribe rules for dealing with cases in which someone lodges a criminal complaint concerning a crime as defined in sections 3 to 8a of the International Crimes Act with the police or public prosecutor's office at a district court. These crimes are as follows: genocide, crimes against humanity, war crimes, torture, and enforced disappearances. The primary rule laid down in these Instructions is that the National Public Prosecutors' Office in Rotterdam has sole responsibility for deciding how to dispose of criminal complaints of this nature. The other public prosecutors' offices immediately forward any criminal complaints relating to the said crimes to the National Public Prosecutors' Office.

[2] See http://wetten.overheid.nl/BWBR0030859/geldigheidsdatum_18-12-2013.

21. The LP-iM is competent to launch investigations ex officio into enforced disappearances (see also section 6 above). The Dutch Government does not know of any limitations to which staff of the National Public Prosecutors' Office or the police may be subject which could restrict their access to places of detention where there are grounds to believe that a disappeared person may be present.

Paragraph 11

Please comment on the compatibility of section 16 of the International Crimes Act, which excludes criminal prosecution for certain categories of persons, with articles 9, paragraph 2, and 11 of the Convention.

22. Section 16 of the International Crimes Act precludes criminal prosecution for the crimes defined in the Act for: (a) foreign Heads of State, Heads of Government and Ministers of Foreign Affairs, as long as they are in office, and other persons insofar as their immunity is recognised under customary international law; and (b) persons who enjoy immunity under any convention applicable within the Kingdom of the Netherlands.

23. In the view of the Dutch Government, section 16 of the International Crimes Act accurately reflects international law as it currently stands. Section 16 (a) contains rules governing immunity, insofar as based on customary international law. Section 16 (b) deals with claims to immunity based on conventions. Examples of such conventions include the Vienna Convention on Diplomatic Relations of 1961 and the Convention on the Privileges and Immunities of the United Nations of 1946. It should be noted that insofar as immunity based on a convention is only functional immunity, it may be assumed that this immunity does not extend to international crimes committed by those concerned in their official capacity.

24. Section 16 (a) relates to claims to immunity that are based on customary international law. Foreign Heads of State, Heads of Government and Ministers of Foreign Affairs possess personal immunity as long as they are in office. After such persons have left office, they possess only functional immunity; that is, their immunity relates solely to acts they performed in their official capacity, not to their personal actions.

25. Where functional immunity is concerned, there is a marked trend towards giving prosecution for international crimes precedence over functional immunity. This trend, in which the interests served by stable international relations are weighed against those served by combating impunity, with the latter tending to prevail, is strong but not yet fully settled. There is no question of any such weighing of interests in relation to claims to personal immunity by persons entitled to claim it. Personal immunity is absolute, under the prevailing views of international law, since in this respect good relations between States and international stability take precedence over securing punishment for international crimes.

26. In accordance with current trends in the international law relating to functional immunity as outlined above, the Government is of the opinion that the three categories of representatives mentioned in section 16 (a), if they are suspected of having committed international crimes in their official capacity, should not be able to claim immunity successfully once they have left office. In concrete terms, this means that the functional immunity that those concerned enjoy after they have left office will probably not constitute an obstacle to the exercise of jurisdiction by a Dutch court, if a reasonable suspicion exists that they have committed international crimes. Any final decision on this point must be made by the courts.

27. Section 16 (a) is not confined to the three categories of representatives named above. It also includes other individuals insofar as their immunity is recognised under customary international law. In the view of the Dutch Government, all participants in official missions enjoy full immunity for the duration of the mission on the basis of customary international law.

Please also indicate whether a denial of extradition could be based on this or other provisions related to immunity granted to certain categories of persons and/or officials (arts. 9, 11 and 13).

28. If an incumbent Head of State, Government Leader or Minister of Foreign Affairs is suspected of committing the crime of enforced disappearance, this person will not be arrested in the Netherlands. This relates to the principles outlined above, including the stability of relations between States. The same applies to individuals who enjoy absolute immunity on the basis of a convention to which the Netherlands is party. It is possible, however, to surrender a person who possesses immunity to the International Criminal Court in accordance with article 98 of the Rome Statute.

Paragraph 12

Please indicate whether mechanisms exist for the protection of complainants, relatives of the disappeared person, their representatives, witnesses and other persons participating in the investigation of an enforced disappearance or any person with legitimate interest requesting information in terms of article 18, paragraph 1, of the Convention against any kind of ill-treatment, intimidation or sanction. Please also provide information about the measures provided for by law to ensure that persons suspected of having committed an enforced disappearance are not in a position to influence and/or obstruct the progress of an investigation by means of pressure or acts or intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation. In this respect, please also indicate whether domestic law provides for suspension from duties during an investigation when the alleged offender is a public official. Please also specify whether there are any procedural mechanisms in place to exclude a security or law enforcement force, civil or military, from the investigation into an enforced disappearance when one or more of its officials are accused of committing the offence (arts. 12 and 18).

29. The position of victims is regulated in the Code of Criminal Procedure and the Victim Support Directive, which set out the policy established by the Board of Procurators General for the benefit of the Public Prosecution Service and the police. Under article 161 of the Code of Criminal Procedure, anyone who has knowledge that a criminal offence has been committed may lodge a criminal complaint. This right is not confined to the victim. Investigating officers have a duty to deal with any such complaint in accordance with article 163, paragraph 5, of the Code of Criminal Procedure. This also applies to offences under the International Crimes Act.

30. Dutch criminal procedural law contains general provisions on the protection of the complainant, the relatives of the disappeared person, their representatives, witnesses and other persons participating in the investigation of an enforced disappearance, but no specific provisions relating to the crime of enforced disappearance.

31. The Minister of Security and Justice is responsible for taking measures to protect intimidated witnesses. The details are elaborated in the Witness Protection Decree. The Board of Procurators-General commissions a threat analysis and seeks advice on the measures to be taken, then decides whether to follow the recommendations. In cases that are politically or administratively sensitive, the Minister is also informed. The threat analysis is drafted, and the protective measures implemented, by a special unit of the National Police, the Witness Protection Team, which has existed since 1995. Over two hundred individuals have been protected since it was first established, as part of 108 Dutch and 36 international witness protection programmes. Most related to the witnesses themselves, but in some cases the protection extended to their partners, children and a small number of other relatives. All measures taken in the context of witness protection are based on the Government's duty of care to protect witnesses. Witness protection measures may be

geared towards protecting the safety of the witness and his family or protecting the confidentiality of information, to prevent the person's true identity coming to light.

32. Dutch law has a variety of instruments to prevent harmful contact between the suspect on the one hand and informants, witnesses and victims on the other. For instance, information regarding the substance of statements and the identity of those giving them can be withheld from the suspect, either temporarily or permanently, if the individual's welfare or the interests of the investigation call for it (articles 30, para. 3, 34, para. 4, 149b, 187d and 226a–226f of the Code of Criminal Procedure). In addition, seeking to influence witnesses is a criminal offence (art. 285a of the Criminal Code).

33. If suspicions arise of a public servant's involvement in a criminal offence, the matter is investigated in principle by the National Police Internal Investigations Department, an independent police unit that bears special responsibility for investigating government officials. The activities of the National Police Internal Investigations Department are laid down in the Instructions on the tasks and deployment of the National Police Internal Investigations Department.

IV. Measures to prevent enforced disappearances (arts. 16-23)

Paragraph 13

In relation to article 16 of the Convention, please provide the following information: (a) the competent authorities to determine the expulsion, return, surrender or extradition of persons; (b) the mechanisms and criteria applied in the framework of procedures of expulsion, return, surrender or extradition to evaluate and verify the risk that a person may be subjected to enforced disappearance; and (c) whether it is possible to appeal a decision on expulsion, return, surrender or extradition and, if so, please indicate before which authorities, what are the applicable procedures and whether they have suspensive effect (art. 16).

34. Within the European Union, persons for whom arrest warrants have been issued are surrendered by the Netherlands on the basis of the Framework Decision on the European arrest warrant. The central authorities designated for the purpose of requests for surrender submitted to the Netherlands are the Amsterdam Public Prosecutor and District Court. All European Union member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. No requested person will be surrendered if the person concerned may become a victim of enforced disappearance. Under section 11 of the Dutch Surrender of Persons Act, the European Convention can be invoked. The District Court is competent to deny the request for surrender. The general assumption is that all States that are parties to the European Convention will respect it.

35. If a person's extradition is sought for criminal prosecution or the enforcement of a sentence, the central authority is the Ministry of Security and Justice, International Legal Assistance (Criminal Matters) Division (AIRS). If AIRS considers that an extradition request fulfils the set criteria, the request is passed on to the Public Prosecution Service and brought before the district court. An appeal in cassation can be lodged from the district court's judgment with the Supreme Court. If the Supreme Court rules that extradition is admissible, the Minister must decide whether or not to grant the request. It is open to the requested person to institute interim injunction proceedings against the Minister's decision, alleging that his extradition would constitute a wrongful act towards him. The requested person can remain in the Netherlands pending the outcome of the interim injunction proceedings at first instance.

36. The Netherlands is party to the European Convention on Human Rights. It cannot, therefore, extradite a person to another country where such extradition would be incompatible with the European Convention. Therefore, a possible obstacle to extradition

would be any reasonable grounds on which to suspect that the requested person may become a victim of enforced disappearance.

37. Any real risk or well-founded fear of being subjected to enforced disappearance upon return or expulsion constitutes grounds for asylum (on the basis of the 1951 Convention relating to the Status of Refugees and/or article 3 of the European Convention). The Immigration and Naturalisation Service (IND) assesses these risks as part of the asylum procedure. The denial of an asylum application can be reviewed by the district court, and the person concerned will not be expelled before the court ruling in first instance has given judgment (i.e. the application for review has suspensive effect).

Paragraph 14

Please indicate whether there is any legal provision that specifically prohibits secret or unofficial detention. Please also provide detailed information about the domestic law in force in the Netherlands to prevent unlawful detention or enforced disappearance as mentioned in paragraph 69 of the report. In doing so, please also provide information about: (a) the conditions under which orders of deprivation of liberty may be given and by which authorities; (b) the legal or other measures requiring prompt notification of and access to lawyers, doctors, family members and, in the case of foreign nationals, to consular representatives, indicating whether these apply from the outset of the deprivation of liberty; (c) whether any conditions and/or restrictions apply to the measures indicated in (b); (d) the guarantees for any person with a legitimate interest to bring proceedings before courts in order to decide on the lawfulness of a detention as provided for in article 17, paragraph 2 (f), of the Convention; and (e) the existing national legislation and practice to ensure the reliable verification of the release of persons deprived of their liberty (arts. 17 and 21).

38. Both article 5 of the European Convention on Human Rights and article 9 of the International Covenant on Civil and Political Rights prohibit any arbitrary deprivation of liberty. Under article 94 of the Dutch Constitution, these provisions take precedence over provisions of national legislation that are incompatible with them, and can be directly applied by the courts. The Dutch criminal justice, criminal procedure, and custodial systems have been harmonised with these international provisions. In addition, "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" and "'enforced disappearance of persons" are specifically defined as criminal offences in section 4, subsections 1 (e) and 1 (i), respectively, of the International Crimes Act.

Paragraph 15

Please provide information about the National Preventive Mechanism (NPM) designated by the State party under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including on the current structure, composition, powers, functioning and territorial competence of the bodies designated as NPM; whether these bodies have competence to visit all places of deprivation of liberty, irrespective of their nature; and whether they have sufficient financial, human and technical resources to carry out their mandate effectively. If there are mechanisms to inspect prisons other than those comprising the NPM, please also provide similar information about them (art. 17).

39. The Netherlands signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in May 2005 but did not ratify it until September 2010. In December 2011, the Netherlands designated its NPM, which is comprised of the following bodies:

- Security and Justice Inspectorate;
- Health Care Inspectorate;
- Youth Care Inspectorate;
- Council for the Administration of Criminal Justice and Protection of Juveniles.

Additional associates (*toehoorders*) include:

- custodial institution supervisory boards;
- police cell supervisory boards;
- military detention supervisory board;
- National Ombudsman.

40. The Government designated the Inspectorate for the Implementation of Sanctions to perform the coordinating and communication functions of the NPM. The Inspectorate for the Implementation of Sanctions has now been merged with the Public Order and Safety Inspectorate and the Supervisory Commission on Repatriation to form the Security and Justice Inspectorate. The aim pursued through coordination is to promote cohesion among the NPM bodies, to facilitate a collective understanding of the Optional Protocol to the Convention against Torture and its requirements, and to encourage collaboration and the sharing of experience among a wide-ranging group of organisations. At the same time, however, the independence of individual bodies is respected, and each body is free to set its own priorities for monitoring detention. By working with all the NPM bodies, the coordinator can gain a clear overview of all the monitoring activities and discern any gaps in regulatory oversight. In addition, the Security and Justice Inspectorate communicates with other national and international bodies. It obtains information about monitoring activities from all the NPM bodies and associate bodies, and it then publishes the annual report of the National Preventive Mechanism of the Netherlands on the basis of that information. The NPM bodies are funded to do their work, but have not received any additional funding since their appointment.

41. With these activities, the Dutch NPM complies with the requirements laid down in the Optional Protocol to the Convention against Torture, as explained in the Guidelines on national preventive mechanisms (CAT/OP/12/5) of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. For a more detailed description of the precise powers, tasks and compositions of the various inspectorates and associate bodies within the NPM, reference is made here, for brevity's sake, to the second annual report to the Subcommittee, which was published recently.[3] There are no other national mechanisms for inspecting prisons.

Paragraph 16

Please provide detailed information about the content of the computerised registers of deprivations of liberty and persons in custody kept by the Custodial Institutions Agency (para. 69 of the report). With regard to this Agency, please also indicate: (a) whether it centralizes and stores all information relating to the deprivation of liberty of persons covering their entire time in custody from arrest until release; and (b) whether it keeps registers concerning all persons deprived of liberty, whatever the nature of the place of deprivation of liberty and/or the territory where they are held (i.e. European or Caribbean part of the Netherlands) (art. 17).

[3] See http://www.ivenj.nl/actueel/inspectierapporten/jaarverslag-nationaal-preventiemechanisme-(npm)-2012.aspx.

42. Every person who has been deprived of his liberty is registered in the central detainee databases. These central databases consist of the Sanction Enforcement System (TULP) for adult detainees and aliens, the Hospital Orders Monitoring System (MITS) for persons subject to hospital orders and others committed to secure institutions, and Youth TULP for juveniles. Since the processing of data is governed by the principles of proportionality and subsidiarity, these systems consist of central and decentralised modules. The information registered in the central module includes personal details, descriptions, psychosocial background data, residence data, information about absence on a trial basis, placement details and grounds for detention. Data relating to specific institutions are stored in the decentralised modules administered by the institutions concerned, in accordance with statutory provisions.

43. Pursuant to articles 567 to 569 of the Code of Criminal Procedure, prisons, juvenile detention centres and institutions are required to register their inmates. The purpose of this registration obligation is to prevent the identity of inmates from remaining unknown. When a person is admitted to an institution for the purpose of enforcing an order depriving him of his liberty or a court judgment, his personal details are registered. The details registered also include the court or official whose decision is to be enforced, the date of the decision, the date and time at which the admission or deprivation of liberty commences, and in the case of a conviction, the duration of the sentence. The registration is signed inter alia by the official who is responsible for enforcing the order or judgment. The director of the institution makes a written declaration to the effect that the person concerned has been admitted. This declaration is given to the official who is responsible for enforcing the order or judgment.

44. The Custodial Institutions Act, the Hospital Orders (Framework) Act and the Young Offenders Institutions (Framework) Act contain special provisions on the record-keeping requirement, the information to be registered, and the way the records should be ordered.[4]

45. The registration requirement applies to all detainees. The details of detainees in the Caribbean part of the Netherlands are not registered in the above-mentioned systems. These detainees are also covered by a registration requirement under article 3 of the Regulations for Custodial Institutions of Bonaire, St Eustatius and Saba (known collectively as BES). These detainees' details are processed in central and decentralised databases according to much the same procedure as that used for detainees of the European part of the Netherlands, using the system known as DISBES, which is similar to TULP.

Paragraph 17

Please indicate whether domestic law guarantees to any person with a legitimate interest access to the information referred to in article 18, paragraph 1, of the Convention. In this respect, please also indicate whether any restrictions to the right to information enshrined in article 18 apply and, if so, please: (a) comment on their compatibility with article 20 of the Convention and other relevant international human rights standards; (b) provide information on their nature and duration; (c) provide information on the existing measures to guarantee that any person with legitimate interest has access to a prompt and effective judicial remedy to obtain information without delay and indicate whether such guarantees can be suspended or restricted in any circumstances; and (d) provide information on existing means of appeal against the refusal to disclose information on persons deprived of their liberty. In addition, and in relation to article 19 of the Convention, please provide information on applicable legislation with regard to the use of personal information

[4] Arts. 35–40 of the Prison Rules, arts. 29–32 of the Hospital Orders (Care) Regulations, and arts. 66–71 of the Young Offenders' Institutions Regulations.

which may be collected and/or transmitted within the framework of the search of a disappeared person (arts. 18, 19 and 20).

46. A person may be deprived of his liberty on grounds deriving from administrative, civil or criminal law. All those who have been deprived of their liberty are entitled by law to the assistance of a lawyer. A person who is being held in custody and (through him) his lawyer have a statutory right to inspect all the information listed in article 18 of the Convention. This information will be provided automatically (in criminal proceedings, at any rate) or at the person's written request. The information listed in article 18 of the Convention will not automatically be supplied to the person's relatives. However, the relatives of the person concerned or their lawyer may ask the person being held in custody or his lawyer to pass this information on to them.

47. Under article 10, paragraphs 2 and 3, of the Dutch Constitution, the right to the protection of personal data is a constitutional right. Therefore, under Dutch law, in line with article 19, paragraph 2, of the Convention, personal data may not be processed in a way that would unjustifiably infringe or have the effect of infringing the rights of an individual. The obligation enshrined in the first sentence of article 19, paragraph 1, of the Convention accords with a central feature of Dutch data protection legislation: purpose limitation. In principle, personal data can only be processed for the purpose for which they were initially collected unless a specific new legal basis is established for further processing. For some types of personal data that are considered sensitive, including medical and genetic data, the conditions for processing are stricter still, since the law defines the conditions under which further processing may be carried out in an exhaustive list (sections 16–22 of the Personal Data Protection Act). In accordance with the second sentence of article 19, paragraph 1, of the Convention, one such condition under which sensitive personal data may be used is when the defence of an individual's vital interests is at stake and it is impossible to ask for his/her consent for the information to be processed (sect. 23 (1) (d), Personal Data Protection Act). In addition, special data protection rules apply in the context of criminal proceedings (sect. 2, Personal Data Protection Act).

48. In subordinate legislation, provision is made for each type of detention regime, specifying who may apply for access to information, and how, and on what grounds this access can be granted or denied.

Paragraph 18

Please provide information about the procedures used to obtain genetic data or medical information. Please also provide information about the Netherlands Forensic Institute referred to in paragraph 65 of the report and, in doing so, please indicate whether this Institute, or any other State party organ, keeps a national DNA database that may be relevant to identify victims of enforced disappearance (arts. 19 and 24).

49. The Netherlands Forensic Institute (NFI) is one of the world's leading forensic laboratories and is a legal entity constituted under Dutch public law, operating under the political responsibility of the Minister of Security and Justice. Although the Dutch police and the Public Prosecution Service may use the NFI's services, which are funded by the Ministry, they are not obliged to do so. This independence means that the NFI is neutral in relation to questions of guilt or innocence. The NFI also operates as transparently as possible (as far as criminal proceedings allow) and welcomes politicians, the media and competitors taking an interest in its work. Its mission is to strengthen the rule of law worldwide. Forensic science plays a growing role in the fight against crime, both in guiding investigations and in furnishing evidence. Acknowledging this role, the NFI seeks to develop the most useful and advanced forensic products and services and to supply them to a wide range of national and international clients. The Netherlands is one of the leading sponsors of the International Commission on Missing Persons (ICMP) and the NFI has a

close relationship with the ICMP, which will be strengthened by the relocation of ICMP headquarters from Sarajevo to The Hague.

50. Besides the criminal DNA database, the NFI also manages a dedicated DNA database for missing persons on behalf of the Dutch national police, containing the DNA profiles of unidentified persons and those of missing persons and/or their family members. If a crime, or a suspected crime, is involved, the DNA profiles of unidentified persons and of missing persons (but not of their family members) are added to the criminal DNA database. The DNA profiles of unidentified persons and of missing persons are also uploaded to DNA database of the International Criminal Police Organization (INTERPOL). In addition, foreign DNA profiles of unidentified persons and of missing persons and/or their family members (obtained via INTERPOL or mutual legal assistance procedures) may also be included in the Dutch DNA database of missing persons, so that any immediate or future match can be detected. The DNA profiles of victims of enforced disappearance and/or their family members may be included in this DNA database, and if a person is found, whether dead or alive, who is believed to have been the victim of enforced disappearance, his/her DNA profile can be checked against this DNA database. Where child trafficking is suspected, it is permissible under Dutch law to take DNA samples from the child and his/her adult companion in order to determine whether the adult companion is the child's biological parent.[5]

Paragraph 19

Please provide information about the legislative or other measures taken to prevent and impose sanctions for the conducts described in article 22 of the Convention (art. 22).

51. The family and acquaintances of a person who has disappeared may apply to the civil court in the Netherlands if they suspect that the person has been unlawfully deprived of his/her liberty by the Government, basing their action on an alleged wrongful act by the State. Alternatively, they may lodge a criminal complaint of the crime of enforced disappearance (section 8a of the International Crimes Act) and/or unlawful deprivation of liberty (art. 282 of the Criminal Code).

52. Delaying or obstructing the application of legal remedies, as described in article 22 of the Convention, is a criminal offence under articles 178 of the Criminal Code (bribery of a judge), as well as under article 179 (bringing pressure to bear on public servants to commit or omit a particular action). Naturally, it may also constitute a criminal offence as a form of joint perpetration of, or complicity in, enforced disappearance.

53. Requests from third parties to provide information about detainees will in principle be refused, since such information is classified as special data within the meaning of chapter 2, division 2, of the Personal Data Protection Act (WBP). Such information is likewise not disclosed, on the basis of section 10, subsection 1, opening words and (d), of the Government Information (Public Access) Act (WOB). However, if there is reason to believe that a third party wishes to make contact with a particular detainee, the request is forwarded to the detainee concerned, who may then make contact with the third party or consent to the requested information being disclosed. If appropriate, the requesting party will be informed of this, but without confirming that the person concerned is indeed being held in detention. A circular has been drawn up with guidelines for dealing with requests in the framework of the WBP and WOB.

54. Under the terms of the relevant framework acts, detainees have a right to communicate by telephone for ten minutes at least once a week. They are also entitled to write letters and to receive visitors — see chapter VII of the Custodial Institutions Act

[5] See arts. 151da (2) and 195g (2) of the Code of Criminal Procedure.

(PBW), chapter VII of the Hospital Orders (Framework) Act (BVT) and chapter VIII of the Young Offenders' Institutions (Framework) Act (BJJ). In addition, a foreign detainee is entitled to inform his country's consular mission of his detention (section 56, subsection 3, of the PBW, section 52, subsection 3, of the BVT, and section 61, subsection 5, of the BJJ).

55. The disciplinary measures and sanctions that may be taken against personnel working in a custodial institution are described in the General Civil Service Regulations, arts. 80 *et seq.*). These measures range from a reprimand to termination of employment.

Paragraph 20

Please indicate whether the State party provides training on the Convention in terms of its article 23 to law enforcement personnel, civil and military; medical personnel; public officials and any other persons who may be involved in the custody or treatment of any person deprived of liberty, in particular members of the police, the Public Prosecution Service and the judiciary. In doing so, please also indicate the nature and frequency of the training provided as well as the authorities in charge of facilitating such training (art. 23).

56. Human rights constitute a unifying theme throughout the courses belonging to the cohesive system of Dutch police training. The initial training courses lay firm foundations for an understanding of human rights, and later courses build on that knowledge. Criminal investigations into cases of enforced disappearance are conducted by the International Crimes Team (TIM) of the National Police Services Unit (ELPD) and the International Crimes Unit of the National Public Prosecutors' Office (LP-IM). The TIM and the LP-IM have the task of investigating the crimes listed in the International Crimes Act and prosecuting those concerned. These crimes are genocide, crimes against humanity, war crimes, torture, and enforced disappearances. The training of the officers attached to the TIM and LP-IM is geared towards investigations and prosecutions related to all crimes listed in the International Crimes Act, including enforced disappearances.

57. The Royal Netherlands Marechaussee performs its law enforcement activities at all times under the exclusive guidance, direction and authority of the Public Prosecution Service and is, to that extent and for the purposes of training, protocols, procedures etc., comparable to the National Police. Consequently, all statements concerning the National Police should be considered to apply mutatis mutandis to the Royal Netherlands Marechaussee. Military personnel charged with duties involving the detention of persons during military operations accordingly receive mission-specific training prior to their deployment.

58. The Training and Study Centre for the Judiciary (TSC) offers regular human rights courses to all members of the judiciary. International crimes, including enforced disappearances, are also regularly addressed by courses of the TSC. These specialised courses are especially relevant to the specialised chambers of the district and appeals courts of The Hague that adjudicate international crimes.

V. Measures for reparation and protection of children against enforced disappearance (arts. 24 and 25)

Paragraph 21

Please indicate whether domestic legislation provides for a definition of victim which is in line with article 24, paragraph 1, of the Convention. Please also provide detailed information about the Victim Support Directive and the relevant provisions of the Code of Criminal Procedure regarding victims (paragraph 70 of the report) as well as on the relevant sections of the Disposal of Criminal Complaints

Instructions with regard to the treatment of victims of international crimes (para. 53 of the report) (art. 24).

59. The Criminal Code of Procedure contains a definition of the term "victim". Anyone who has suffered a financial loss or other disadvantage as a direct consequence of a criminal offence is defined as a victim. A legal entity that has suffered a financial loss or other disadvantage as a direct consequence of a criminal offence is considered equivalent to a victim. Family members of a deceased victim have the same rights.

60. The rights laid down in the Criminal Code of Procedure, which are elaborated in greater detail in the Victim Support Directive, are the right to be treated with respect, to be informed of one's rights and on the progress of the case, to inspect the case file, to receive compensation for damage or loss suffered, to add documents to the case file, to obtain legal assistance and the help of an interpreter, and in serious cases the right to be heard in court. These rights apply to all victims in prosecutions governed by the Criminal Code of Procedure.

Paragraph 22

In relation to paragraph 72 of the report, please provide detailed information on: (a) the legal or other measures adopted to guarantee the right to the truth of victims of enforced disappearance in terms of article 24, paragraph 2, of the Convention and indicate whether victims can participate in proceedings; and (b) the relevant procedures in place for obtaining compensation, including who would be responsible for providing it, and indicate whether, besides compensation, domestic law provides for other forms of reparation for the persons who have suffered harm as the direct result from an enforced disappearance in line with article 24, paragraph 5, of the Convention. In addition, and if relevant, please update the information provided in the core document submitted in December 1995 for the European part of the Kingdom with regard to compensation for victims and rehabilitation (HRI/CORE/1/Add.66, paras. 212-241). In this respect, please also indicate whether the Criminal Injuries Compensation Fund and the National Victim Support Association referred to in paragraphs 234-237 of the said core document are still operative and, if so, please provide updated information about their functioning, available resources, territorial presence, and activities they perform which may be relevant in terms of article 24, paragraphs 4 and 5, of the Convention (art. 24).

61. Article 51b of the Code of Criminal Procedure lays down the victim's right to inspect the case file. At the victim's request, the public prosecutor will grant the victim permission to inspect the documents in the case that are of relevance to him/her. During the hearing this permission will be granted by the court of first instance that is hearing the case, and at other stages it will be granted by the public prosecutor. The public prosecutor may refuse to permit inspection if he judges that the documents concerned cannot be regarded as documents in the case, or that inspection would cause serious inconvenience to the witness, would seriously hinder the witness in the performance of his/her office or profession, or would be prejudicial to a compelling interest related to the investigation or to the interests of State security. The public prosecutor must apply to the examining magistrate for written authorisation for the refusal. The victim may obtain copies of the documents he/she has been permitted to inspect at the court registry.

62. It is first and foremost the offender's responsibility to pay compensation to the victim or, if the victim has died, to his/her family members. Compensation may be claimed in the course of the criminal proceedings. In cases of violent or sexual offences, the State will pay the compensation awarded by the court to the victim or family members of a deceased victim in advance. The Criminal Injuries Compensation Fund pays compensation at the request of the victim or family members of a deceased victim in cases of violent crimes committed on the territory of the Netherlands (not including Bonaire, St Eustatius

and Saba). The amount of compensation depends on the severity of the damage. Victim Support Netherlands provides emotional and practical support and legal assistance to all victims of crime, including family members or anyone affected. Victim support is available free of charge in the Netherlands. Both the Criminal Injuries Compensation Fund and Victim Support Netherlands are funded by the State.

Paragraph 23

Please provide information about applicable law with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in matters such as social welfare, financial matters, family law and property rights (art. 24).

63. Articles 409 to 414 of Book 1 of the Civil Code lay down regulations that apply in the case of missing persons and the legal presumption of death. Article 1:409 provides for measures that can be taken to arrange for the administration of a missing person's property. Article 1:413 sets the periods of time for establishing the legal presumption of death. Once there is a legal presumption of death, or the person's death has been established, matters such as matrimonial property and the person's estate can be settled.

64. It is not possible for a social security administration agency that pays social security benefits to establish whether a person has been the victim of enforced disappearance. In general, it may be observed that benefit payments will be stopped when a benefit recipient ceases to reply to correspondence or when the agency is no longer able to make contact with the person concerned. The consequences in terms of social security for the family members of a benefit recipient who disappears are as follows. If the insured person disappears, he or she is presumed dead one year after the last time contact was made with the person concerned, unless the facts and circumstances suggest otherwise. From that date onwards, the surviving relatives can claim benefit pursuant to the Surviving Dependants Act (ANW), provided the statutory conditions of the ANW are met. Family members who live in the Netherlands and who are no longer able to provide for themselves as a result of a person's disappearance can apply for benefit under the Work and Social Assistance Act (WWB). The level of benefit paid out under the WWB is linked to the statutory minimum wage in the Netherlands. If a partner who is eligible for child benefit vanishes without a trace, the payment of the child benefit will be transferred to the remaining partner who is raising and caring for the children, always providing, of course, that the statutory conditions of the General Child Benefit Act are met. Where old-age pension is concerned, a person's disappearance does not have any consequences for family members. Family members who are insured (working or residing in the Netherlands) build up 2 per cent of the entitlement to old-age pension for each year that they are insured.

Paragraph 24

Please specify the content, including penalties, of articles 279, 280 and 282 of the Criminal Code (para. 73 of the report). Please also provide information on the relevant criminal provisions to be applied with regard to the conducts described in article 25, paragraph 1 (b), of the Convention (art. 25).

65. Article 279 of the Criminal Code provides that:

(a) Anyone who intentionally removes a minor from the authority under which he has been lawfully placed or from the supervision of a person authorised to exercise such supervision is liable to a term of imprisonment not exceeding six years and/or a fourth-category fine;

(b) If deception, violence or the threat of violence is used, or if the minor is under the age of twelve, the offender is liable to a term of imprisonment not exceeding nine years and/or a fifth-category fine.

66. Article 280 of the Criminal Code provides that:

> Anyone who intentionally conceals a minor who has been removed, or who has absconded, from the authority under which he has been lawfully placed or from the supervision of the party authorised to exercise such supervision, or who impedes the efforts of the criminal justice authorities or police officers to find him, is liable to a term of imprisonment not exceeding three years and/or a fourth-category fine, or, if the minor is under the age of twelve, to a term of imprisonment not exceeding six years and/or a fourth-category fine.

67. Article 282 of the Criminal Code provides the following:

> (a) Anyone who intentionally and unlawfully deprives another person of his liberty or keeps him deprived thereof is liable to a term of imprisonment not exceeding eight years and/or a fifth-category fine;
>
> (b) If as a consequence of the offence the victim suffers serious bodily injury, the offender is liable to a term of imprisonment not exceeding nine years and/or a fifth-category fine;
>
> (c) If the offence results in a person's death, the offender is liable to a term of imprisonment not exceeding twelve years and/or a fifth-category fine;
>
> (d) Anyone who intentionally makes premises available for the purpose of unlawful deprivation of liberty is likewise liable to the penalties laid down in this article.

68. The conduct described in article 25, paragraph 1 (b), of the Convention is covered by articles 225 to 227 of the Criminal Code, which penalise forgery. In addition, article 236 of the Criminal Code provides that any act obscuring from whom someone descends gives rise to a term of imprisonment not exceeding five years and/or a fourth-category fine.

Paragraph 25

> *Please provide information on the procedures in place to review, and if necessary annul, any adoption or placement of children that originated in an enforced disappearance. If such procedures have not been set up so far, please indicate whether there are any initiatives to bring national legislation into line with article 25, paragraph 4, of the Convention. In addition, please: (a) elaborate the information provided in paragraph 73 of the report concerning Dutch law making provision for account to be taken of the special interest of children who are victims of enforced disappearance; and (b) indicate whether domestic law provides for the right of children who are capable of forming their own views to express those views freely in all matters which are affecting them, especially those related to enforced disappearance (art. 25).*

69. In general, the adoption can be revoked by decision of the court at the adoptee's request. This request can only be granted if the revocation appears to be in the adoptee's best interests, the court is convinced of the reasonableness of the revocation, and the request is submitted no less than two years and no more than five years after the date on which the adoptee reached the age of majority.